

FEBRUARY 10. 1773.

INFORMATION

FOR

JOHN MILLER, Shepherd to Alexander Murdiston tenant in the farm of Ormiston *alias* Wormiston, now prisoner in the tolbooth of Edinburgh, Pannel,

A G A I N S T

JAMES MONTGOMERY, Esq; of Stanhope, his Majesty's Advocate, Pursuer.

THE said John Miller, and Alexander Murdiston, his master, having been indicted at the instance of his Majesty's Advocate, as being guilty, actors, art or part of the crimes of *theft* and *sheep-stealing*, or of the *receiving* and *keeping* sheep, or *exposing them to sale*, knowing them to be *stolen*, certain objections to the relevancy of the indictment were stated upon the part of the pannels; but these objections not appearing sufficient to the court to cast the indictment, the following interlocutor was pronounced upon the 14th of December last. "The Lord Justice-Clerk and Lords Commissioners of Justiciary, having considered the criminal indictment, raised and pursued at the instance of James Montgomery of Stanhope, Esq; his Majesty's Advocate, for his Majesty's interest, against Alexander Murdiston tenant in the farm of Ormiston *alias* Wormiston, in the county of Peebles, and John Miller shepherd to the said Alexander Murdiston, in the said farm of Ormiston *alias* Wormiston, both now pri-

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“soners in the tolbooth of Edinburgh, pannels, with the foregoing debate, they find the indictment relevant to infer the pains of law; but allow the pannels, and each of them, to prove all facts and circumstances that may tend to exculpate them, or either of them, or alleviate their guilt of the crimes charged against them, and remit the pannels, with the indictment as found relevant, to the knowledge of an assize.”

In consequence of this interlocutor, a long and tedious proof was led, in presence of the jury, who were inclosed late upon the night of Saturday the 9th of January, and did not break up till five o'clock of the morning of the 10th; and upon Monday the 11th, they returned their verdict in the following terms. “At Edinburgh, the tenth day of January, in the year one thousand seven hundred and seventy-three years, the above assize having inclosed, they made choice of the said John Borthwick of Cruikstone to be their chancellor, and of the said Thomas Fairholm to be their clerk; and having considered the criminal indictment, raised and pursued at the instance of James Montgomery of Stanhope, Esq; his Majesty's Advocate, for his Majesty's interest, against Alexander Murdiston tenant in the farm of Ormiston *alias* Wormiston, in the county of Peebles, and John Miller shepherd to the said Alexander Murdiston, in the said farm of Ormiston *alias* Wormiston, both now prisoners in the tolbooth of Edinburgh, pannels, as restricted by the prosecutor in the course of the trial, the interlocutor on the relevancy thereof, pronounced by the Lord Justice-Clerk and Lords Commissioners of Justiciary, the depositions of the witnesses adduced by the prosecutor for proving his indictment, the declarations of the pannels respectively emitted by them before the sheriff-substitute of the county of Peebles, and admissions of the pannels relative thereto, and whole minutes of procedure, and interlocutors thereon, in the course of the trial; together also with the depositions of the witnesses adduced by the pannels for their exculpation, certificate anent the pannel Alexander Murdiston's character, and admission of the prosecutor thereanent, they, by a great plurality of voices, find the following articles of the indictment proven against the said pannel Alexander Murdiston, *viz.* In so far as regards eight ewes of the eleven, and the tup-hog, the property of William Gibson
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“ son tenant in Newbie, in the county of Peebles, and one
 “ ewe, the property of James Hislop herd to the said William
 “ Gibson, which were found on the farm of Ormiston *alias*
 “ Wormiston; as also, with regard to twenty ewes, part of
 “ twenty-one ewes, the property of Thomas Gibson tenant in
 “ Greiston, in the county aforesaid, found on the pannel’s farm
 “ aforesaid; and all in one voice find the following articles of
 “ the indictment proven against the said Alexander Murdison,
 “ *viz.* in so far as regards the fifteen hogs, the property of Ro-
 “ bert Horsburgh tenant in Colquhare, in the county aforesaid;
 “ and thirteen hogs, the property of said William Gibson, sold
 “ by the said Alexander Murdison to John Bertram tenant in
 “ Westhope, in the county of Haddington, and found on the
 “ said farm of Westhope; as also, in so far as regards sixteen
 “ ewes and four hogs, the property of Walter Simpson tenant
 “ in Easter Dawick, in the county of Peebles, and found on
 “ the farm of the said pannel; and all in one voice find the in-
 “ dictment proven against John Miller the other pannel, so far
 “ as regards the ten ewes and lambs, the property of George
 “ Cranston of Dewar, and eleven ewes and lambs, the property
 “ of David Tweedie tenant in Ladyside, in the county of Edin-
 “ burgh; in witness whereof, the said chancellor and clerk have
 “ subscribed these presents, consisting of this and the two pre-
 “ ceding pages, in their name and by their appointment, place
 “ and date aforesaid.

(Signed) { Jo. BORTHWICK, Chancellor.
 { Tho^s FAIRHOLM, Clerk.

This verdict being read in court, it was moved by the coun-
 sel for the pannels, that they should be allowed a short time to
 consider it. This request your Lordships immediately granted;
 and in order that the pannels might have the assistance of their
 senior counsel, on whose abilities they justly placed the greatest
 dependence, your Lordships humanely indulged them with still
 a longer delay; and the court was adjourned from time to
 time, till Monday the 24th of January last, when their counsel
 were allowed at great length to state the arguments in point of
 law, upon which they maintained, that, in consequence of the
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verdict returned by the jury, and above inserted, no sentence could possibly be pronounced against either of them.

The debate being closed, your Lordships were pleased, of that date, to order informations.

The information for the prosecutor has been accordingly given in; and as the pannels stand upon different ground in one respect, though in that one only, it occurred to their counsel that their plea would be less embarrassed by giving in separate informations for each, than one in the name of both. This is therefore humbly offered upon the part of the pannel John Miller.

The objections stated upon the part of the pannels to the verdict returned by the jury, as incapable of being made the foundation of any sentence against them, resolved chiefly into the three following. *1mo*, That the verdict was void and null, in respect of its being dated upon a Sunday, on which day no judicial procedure of any kind is by law allowed to take place. *2do*, That it was likewise void and null, in respect that it did not exhaust the whole matter of the indictment, and was, on the contrary, totally silent with regard to several particulars charged against the pannels in that indictment; and, *3tio*, That although the indictment had charged the pannels as being guilty of alternative crimes, so inconsistent of their own nature, that the same person could not be guilty of both, yet the verdict had not distinguished between the one or the other, and did not point out which of these alternative crimes the jury meant to find proved against either the one or the other of the pannels. That the verdict was therefore altogether ambiguous and inexplicable, and of course no judgement condemnatory could possibly proceed upon it, and nothing was left to the court but to dismiss both pannels from the bar.

The two first of these objections, arising from the date of the verdict, and from its not exhausting the charge in the indictment, apply with equal force to both pannels; and as these objections have been fully treated, and the authorities in support of them stated at length in the information for Alexander Murdison, it is unnecessary to trouble your Lordships with an irksome repetition.

It is equally unnecessary to trouble your Lordships in this information with the principles upon which the third objection, respecting

respecting the ambiguity and uncertainty of the verdict, was maintained by the counsel for the pannels in the opening of the debate. These principles, and the authorities quoted in support of them, have likewise been laid fully before the court in the information for Alexander Murdison. It is therefore proposed to confine this paper to a few observations upon the answer attempted to be made on the part of the prosecutor to this objection: and even in this particular, the pannel John Miller has the satisfaction to find himself greatly relieved by the accuracy and force of reasoning so observable in the information for Alexander Murdison.

During the course of the pleading, the counsel for the prosecutor seemed to rest their answer to this objection upon a proposition which they themselves were pleased to assume, *viz.* That the verdict returned by the jury was, what, in the language of this court, is commonly denominated a *special verdict*; by which the jury, without finding an indictment proved either in whole or in part, or a pannel guilty, find certain facts proved, and leave it to the court to determine whether these facts do or do not amount to the crimes charged. And upon that footing they contended, that as in this case there was no uncertainty with regard to the facts found by the jury, your Lordships were undoubtedly at liberty, and it was the province of the court to apply the law, and, upon comparing the verdict with the indictment, to determine whether the facts so found by the jury did, or did not amount to the crimes charged in that indictment.

The pannel John Miller apprehends, that he might safely agree to this construction put upon the verdict by the prosecutors counsel, and shall in the sequel satisfy your Lordships, that if such construction were to be adopted, it is impossible that the court could pronounce sentence against him, or hold him as guilty of either one or other of the crimes charged against him. It would indeed seem, that the prosecutors counsel were sensible the ground they had taken up was not to be trusted; for, in their information, they have endeavoured to amend their argument. They still insist, that even though it were to be considered as a special verdict, finding only certain facts proved, the matter is perfectly clear, and the plea of uncertainty must fly off. They however go further, and now likewise maintain,

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that upon the footing of its being a general verdict, finding the indictment proved with regard to certain particulars, still any seeming uncertainty is not in the fact, which it is the province of the jury to ascertain, but in the law, which it is the duty and business of the court to determine; that considering it as a general verdict returned upon the indictment, the interlocutor of relevancy, and the proof all taken together, the import of it is shortly this, "That they had found the pannels guilty of stealing or of resetting, knowing them to be stolen, some parcels of the sheep mentioned in the indictment; but that they could not determine whether, by the rules of law and legal evidence, the facts upon which they had so found ought to infer theft or reset of theft;" that, viewing the matter in that light, there is no uncertainty whatever in the fact, and that it is the province of the court to determine the point of law, which the jury did not take it upon them to decide.

The pannel must however acknowledge, that he is very much at a loss to understand the import of this plea. He sees indeed an attempt made to consider this verdict as a *general* verdict, and at the same time to explain it as if it were *special* in the strictest sense of the word; for it is admitted, that the jury have given no determination with regard to the pannel's being guilty of either of the crimes laid to his charge; and in order to supply that defect, it is supposed that your Lordships are bound to enter into a new discussion of the facts, and to determine into which of the two crimes supposed to be charged in the indictment these facts may most easily be moulded.

The pannel has all imaginable respect for the court, but this notwithstanding he cannot submit to a doctrine that seems so evidently to tend towards establishing in the judges a power of deciding what the law of this country, jealous of the rights and privileges of the meanest subject, has appropriated to juries only.

Where a special verdict is returned, confining the finding of the jury to certain facts, but without stamping any consequence upon these facts, it is proper and necessary that the court should interpose, and decide whether the facts so found do or do not necessarily bring home the crime charged in the indictment to the pannel. In that case, the jury have devolved their power of ascertaining the legal consequences of such facts upon

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upon the judges, and the judges must exercise the power so devolved upon them.

The matter, however, is very different in the case of a general verdict, where the jury, instead of confining themselves to particular facts, apply themselves to the general charge of the indictment, so as not only to determine the facts, but likewise to determine legal consequences attending them. In such a case, they must either find the pannels guilty or not guilty, or the indictment proved or not proved. This is essential to the nature of a general verdict. But in this case, the jury, though they have found the indictment proved against both pannels with regard to certain articles thereof, yet they have not found either the one or the other of them guilty either of theft or the reset of theft, the two different crimes supposed to be charged against them; and that being once admitted, it must follow of course, that no judgement can be pronounced against them, as guilty either of the one or the other of these crimes. For it will not avail the prosecutor, to plead that the jury meant to refer it to the court to determine of which of the two crimes they ought to have found them guilty. A special verdict impowers the judges to apply the law to the facts found by the jury; but when a jury once finds a pannel guilty of a crime, the court can only inflict the punishment due to such crime; and if there is any uncertainty in the verdict with regard to the crime thereby meant to be found proved, the verdict must necessarily fall to the ground, and no procedure can be had upon it. There is no certainty that the jury meant to devolve any power upon the court to take any inquiry concerning the facts: on the contrary, the natural presumption is, that if they had so intended, they would have returned a special verdict. The verdict must therefore be taken with all its defects; and of these defects the pannel is intitled to avail himself, in the same manner as if it were liable to objection in point of form.

Let it be supposed that a person were indicted in this manner; "Whereas by the laws, &c. rape or murder are crimes of a heinous nature, and severely punishable, yet true it is, that you A. B. have presumed to commit, and have been guilty actor art or part of the foresaid crimes, in so far as, &c." that in the minor proposition, a variety of facts were charged that might apply to one or other of the crimes so libelled, or
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even to both ; that this libel had concluded in the following manner, " at least times and places respectively above mentioned, the said C. D. was ravished or murdered, and you the said A. B. are guilty actor art or part of the said rape or murder ;" and that this alternative indictment being remitted to the knowledge of an assize, the jury had returned a general verdict, finding the indictment proved with regard to certain articles : would such a verdict be sustained ? or would it be competent for the court to pronounce a condemnatory judgment upon it ? It might there be pleaded, that both crimes inferring a capital punishment, it could be of no consequence whether the jury meant to find the pannel guilty of the one or the other : but to this it is thought it would be a sufficient answer, that as the jury had found him guilty of a crime, but had not said what that crime was, the court could not take it upon them to supply the defect : the verdict was compleat ; it devolved no power upon the court to judge whether the pannel was guilty of the one crime or the other, and the pannel was intitled to avail himself of the blunder of the jury, and the defect of their verdict.

The crimes charged in the present indictment are, however, equally distinct with those charged in the case above supposed, with these additions, that the same person could not be guilty of both, and that a person may be guilty of the one, without any criminality whatever upon his part. Many cases may be figured where one may receive and keep sheep, knowing them to be stolen, or expose them to sale, knowing them to be stolen, without any fraudulent intention whatever. Nay, instances were pointed out in the course of the pleadings upon the relevancy to show, that such things may be done even *pio animo*. In such a case therefore it was doubly incumbent upon the jury to determine, with accuracy and precision, which of the two alternative charges of the libel they meant to find proved against either the one or the other of the pannels.

Nor will it avail the prosecutor to resort to the interlocutor upon the relevancy. The case stands now upon a very different footing from what it did then. It was uncertain what facts might come out upon the proof ; and until these facts were ascertained it must have remained a doubt whether the pannels receiving and keeping ~~sheep~~, or exposing them to sale, knowing them to be stolen, would
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infer any criminality in them or not. That would necessarily depend upon the circumstances attending their receiving the sheep, or their exposing them to sale. Your Lordships therefore found the indictment relative to infer the pains of law, but allowed the pannels to prove all facts and circumstances that might tend to exculpate them, or alleviate their guilt. By this means it was left to the jury to find them guilty of resetting such or such parcels of sheep; or, if they thought proper to return a special verdict, finding such or such facts proved, and if, upon their doing so, your Lordships had been of opinion, that the facts so found did exclude the possibility of the pannels innocence in receiving and keeping sheep, or exposing them to sale, knowing them to be stolen, you would have been at liberty to pronounce judgement against them, and to condemn them to suffer the pains of law. No such verdict however has been returned; and as the verdict must be taken as it stands, without its being competent to inquire whether on the face of the proof there appears any circumstances favourable or unfavourable for the pannels; so that verdict amounts only to this, That the pannels were guilty either of stealing sheep, or of receiving and keeping sheep, or exposing them to sale knowing them to be stolen; and as the last alternative may, according to circumstances, be either criminal or not criminal, and the verdict does not distinguish to which of the two alternatives it means to apply, it is impossible to say, whether the jury have or have not found the pannels guilty of a crime.

It shall only further be observed upon this head, that the counsel for the prosecutor seem totally to mistake the meaning of a general verdict, when they suppose it to find particular facts proved; and that your Lordships are to judge from these facts of which of the alternative crimes the pannel is guilty. The verdict here returned, taking it as a general verdict, finds no particular facts proved; it only finds the indictment proved with regard to certain articles. In other words, it finds the pannel John Miller guilty of stealing, or receiving and keeping, or exposing to sale, knowing them to be stolen, ten ewes and lambs, the property of Mr Cranston of Dewar, and eleven ewes and lambs, the property of David Tweedie; but it finds no particular facts proved with regard to such sheep. Such finding might have taken place in a special verdict, but in a general verdict there is

no room for it. It is therefore impossible for your Lordships to enter upon facts as you would do in the case of a special verdict. You have no fact before you but this, that the jury intended to find the pannel guilty of one of the crimes laid to his charge; but as they have not said which, they have in fact found him guilty of neither, and of consequence he cannot be liable to punishment.

The pannel does therefore humbly submit to your Lordships, that if this verdict shall be considered as a general verdict, it is altogether inexplicable on account of its ambiguity and uncertainty, and that no judgement can pass upon it.

If, on the other hand, that construction shall be given to it, which the counsel for the prosecutor first adopted, by considering it entirely as a special verdict, finding only certain facts contained in the minor proposition, it seems perfectly clear, that no punishment can be inflicted upon the pannel, and that he must be dismissed from the bar.

Viewing the verdict in this light, it falls to be considered by your Lordships precisely in the same manner as if it had *verbatim* found the facts stated in the indictment with regard to the sheep belonging to George Cranston of Dewar and David Tweedie tenant in Ladyside, proved against the pannel. The question comes therefore fairly to this, Whether do these facts, either taken singly or jointly, *necessarily* imply guilt against him and exclude all *possibility* of innocence? for if it is possible that these facts may all be true, and yet the pannel be innocent either of theft or reset of theft, your Lordships justice will prevent you from inflicting any punishment upon him. It is by no means sufficient that they create a suspicion of guilt; nay, it would not be sufficient, though your Lordships were convinced in your own minds, that he was the actual thief of these sheep. The possibility of his innocence must be sufficient *in hoc statu*, to protect him from all punishment.

The pannel does not mean to maintain, that no regard is to be paid to circumstantiate evidence in the trial of criminals, unless the circumstances are such as necessarily exclude innocence, or that a jury ought never to condemn where there is a bare possibility of innocence. The pannel is under no necessity of maintaining such a doctrine. He may safely admit, that where the jury are, from the circumstances brought in evidence before

fore them, convinced in their own minds, that a pannel is really guilty of the crime laid to his charge, they may, with a safe conscience, return a verdict against him, notwithstanding the possibility of their being mistaken. But the case is very different when a special verdict is returned by the jury, finding certain facts proved, and it is left to the court to determine what legal consequences these facts are to have. In such a case, the court can go no further than the words of the verdict, and must take under their consideration the simple facts thereby found proved, and unless these facts do of themselves necessarily infer the crime charged in the indictment, and exclude the possibility of the pannel's innocence, no punishment ought to proceed.

To apply this to the case in hand. The verdict, so far as relates to the pannel John Miller, finds that the said George Cranston of Dewar and David Tweedie, having missed several ewes and lambs, and having been informed that sheep bearing their marks were seen upon the farm of Snaddon, in the county of Haddington, they found ten ewes and lambs, the property of the said George Cranston, and eleven ewes and lambs, the property of the said David Tweedie, upon the said farm of Snaddon; and that upon their proving the said ewes and lambs to be their property, they were, by order of the sheriff, delivered over to them; that the pannel having met with James Braidwood at Harriot-house fair in the month of May last, he undertook to deliver to the said James Braidwood a score of ewes and lambs in a fortnight; that the pannel did accordingly, in the morning of the 14th of June last, or one or other of the days of that month, call at the house of Andrew Braidwood, brother to the said James, and after telling him he had brought the ewes and lambs he had promised to his said brother, and desiring him to carry them forward to Snaddon, the pannel delivered the said sheep to the said Andrew Braidwood, consisting of twenty-one ewes and twenty-one lambs, who carried and delivered them to his brother the said James Braidwood; that the sheep so delivered were the ewes and lambs, the property of the aforesaid George Cranston and David Tweedie, which were found upon the said farm of Snaddon, and that the said ewes and lambs had recently been upon the said lands of Dewar and farm of Ladyside, or at least the said ewes were upon the said lands of Dewar and farm of Ladyside at shearing-time, in the month of October or November preceding, and were stolen therefrom.

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This must be admitted to be the full import of the verdict, upon the supposition of its being a special verdict, merely confined to facts; and it only remains to inquire, whether the facts so found do necessarily bring home the guilt of theft, or even of reset of theft to the pannel; and that they do not is as clear as any proposition can be. Let it only be supposed, that the pannel had purchased these sheep at a public fair from a person who had stolen them from the farms of Dewar and Ladyside: the thing is not impossible; it may therefore be supposed. In that case, the pannel would have been perfectly innocent, and this notwithstanding the whole of the facts found by the jury might have been true, and the same verdict might have been returned against him. The verdict therefore, now under consideration, does by no means exclude the possibility of the pannel's innocence, or necessarily fix guilt upon him, and of course your Lordships are not intitled to consider him as guilty. Indeed, the inflicting punishment in consequence of such a verdict would be a most dangerous precedent. Many gentlemen of rank, fortune, and high character, are possessed of sheep-farms, which are committed to the care of their herds. These herds may be dishonest; they may dispose of part of their masters sheep for their own behoof; they may steal others from the neighbourhood to supply the place of those they have disposed of; they may deface the old marks, and put their masters marks upon them; the master may sell them himself, and may be present at the delivery; they may afterwards be discovered by the true owners; a prosecution may be brought against him as guilty of theft; a verdict may be returned, finding these special facts proved, and he may suffer both the infamy and the punishment of a heinous crime, though perfectly innocent. The picture here laid before your Lordships is striking, but it is just, and must show the impropriety of pronouncing sentence upon such a verdict as that returned against the pannel, which falls short of the one now supposed in a most material article, *viz.* That it does not find, that the pannel had substituted his marks upon the sheep in question.

It may perhaps be objected, that if the pannel had been innocent, he would have brought evidence in support of his innocence, by calling the person from whom he had purchased the sheep, or those that were present at their being delivered to him.

But this objection admits of many answers. The person from whom

whom he bought them may have been unknown to him, he might not know where to find him, he might be dead, or might have left the country before the trial was brought, the delivery might have been made before persons who were absolute strangers to the pannel, or he might have been unable to find them out, so as to call them as witnesses in his exculpation; and many other circumstances might concur to prevent him from establishing his innocence by proving so material a fact.

But even supposing that a jury might think themselves at liberty, upon a circumstantiate evidence of this sort, to infer guilt against a pannel, and that from his not being able to satisfy them how he came by the sheep, they might be convinced that he had stole them, your Lordships, when judging of the import of a special verdict, stand upon very different ground. You cannot look back into the proof, or take under your consideration any omission upon the part of the pannel, or lay any stress upon his failing to prove how he came by the sheep: that would be to make a verdict, not to judge of one. You must therefore take the verdict as it stands; and unless the facts thereby found do of themselves, and without resorting either to extraneous circumstances, or to probabilities, or presumptions, necessarily infer guilt, no punishment can be inflicted in consequence of it. However much your Lordships might have been inclined as jurymen to return a verdict against the pannel, however much you may be convinced in your own mind from the proof led in your presence of his guilt, these considerations must now be laid aside. The verdict is alone to be regarded; and if the facts found by that verdict do not exclude the possibility of innocence, he must, with all submission, be dismissed from the bar, and can no more suffer punishment than if a verdict had been returned finding him not guilty.

The pannel shall detain your Lordships no longer, and is hopeful, that whether the verdict shall be considered as a general or a special verdict, you will be of opinion that it cannot be made the foundation of any criminal sentence.

In respect whereof, &c.

ALEX. WIGHT.

